

Memorandum

To: Duphus Dillinger, CEO, RedBlue

From: Eric K. Corpus

Date: October 1, 2023

Subject: Understanding "State Action," Net Neutrality, and Its Implications

This memorandum serves to address and clarify concerns regarding the "state action" concept as it pertains to RedBlue's terms of service, provide an overview of net neutrality in its evolving American context, and offer a personal perspective on the net neutrality debate.

OVERVIEW

State Action and RedBlue's Member Concerns. The foundational tenets of American constitutional law, including the concept of "state action" as illuminated by Sheldon Nahmod, emphasize the distinction between private enterprises and government actions. As society continues to evolve, particularly in the digital domain, understanding these tenets becomes paramount.

At its core, the "state action" doctrine delineates the boundaries of the U.S. Constitution, especially the First Amendment, in its application to private and public entities. The First Amendment, renowned for safeguarding the freedom of speech among other liberties, is explicitly tailored to prevent governmental infringements on these rights. Private entities, unless acting as extensions of the government, are generally outside the purview of these constitutional constraints.

RedBlue, in its essence, is a private digital platform. The terms of service, which members voluntarily accept upon registration, are binding contractual agreements. These agreements, while ensuring a respectful and harmonious environment for discourse, might entail restrictions that some might view as curtailments of free speech. However, given RedBlue's status as a private entity, these terms are not under the same constitutional scrutiny as governmental regulations would be.

The concerns voiced by certain members, rooted in the belief that their First Amendment rights shield them from such private contractual stipulations, stem from a fundamental misunderstanding of the "state action" doctrine. While the First Amendment stands as a bulwark against governmental infringements on speech, it doesn't necessarily grant carte blanche rights in private digital arenas like RedBlue. This distinction is crucial in an age where digital platforms often serve as primary venues for public discourse. As such, while RedBlue respects and values the principle of free speech, it also holds the prerogative to curate its platform environment through its terms of service.

Net Neutrality in America – An Evolving Landscape. Net neutrality remains a cornerstone topic in U.S. telecommunications, invoking significant debate and policy shifts. At its core, net neutrality seeks to ensure that all internet users should have uniform access to online content.

This principle aims to prevent Internet Service Providers (ISPs) from charging more money for quicker services or selectively throttling or blocking specific content (Washburn, 2023).

Historically, the FCC first recognized net neutrality principles in 2005. It was a response to growing concerns about ISPs potentially favoring their own services or the services of those who paid for better treatment. This period was marked by the early days of streaming and online services, where equal access to the internet became critical for innovation and competitive fairness (Washburn, 2023). The Open Internet Order of 2015, during President Obama's tenure, solidified these principles by classifying the internet as a public telecommunication utility. This regulatory change was designed to prevent ISPs from instituting a tiered service system or engaging in data discrimination (Washburn, 2023).

However, net neutrality's journey has been marked by political oscillations. While Obama's era leaned towards tighter regulations, President Trump's administration saw repeals. President Biden's term, despite challenges, aims to reintroduce these regulations. The Senate confirmation of Anna Gomez to the FCC, for instance, hinted at a return to Obama-era regulations and stricter oversight (Lima, 2023).

In a significant recent development, the FCC has proposed rules to further solidify net neutrality. As reported by Brian Fung of CNN, current FCC Chairwoman Jessica Rosenworcel, offered, "... the Federal Communications Commission will designate internet service – both the wired kind found in homes and businesses as well as mobile data on cellphones – as “essential telecommunications” akin to traditional telephone service... the rules would ban ISPs from blocking or slowing down access to websites and online content” (Fung, 2023). These rules emphasize the commitment to maintaining an open and unbiased internet for all users.

Net neutrality will remain a hot-button issue. As Fung notes, "... the proposal is likely to trigger strong pushback from internet providers who have spent years fighting earlier versions of the rules..." (Fung, 2023). Net neutrality will continue to be a focal point in U.S. telecommunications, with its evolution reflecting broader socio-political dynamics and the ongoing tension between regulatory and free-market perspectives.

Personal Perspectives on the Net Neutrality Debate. Net neutrality, while universally acknowledged as crucial for an open internet, sparks divergent opinions on its implementation and regulation.

ISPs, as private entities, fundamentally operate in a realm of profit and competition. Subjecting them to heavy governmental regulations could potentially stifle innovation and deter new market entrants. Advocates for a more laissez-faire approach argue that the free market, driven by competition, can organically ensure net neutrality. If an ISP adopts unfavorable practices, consumers, in a competitive market, would possess the choice to switch providers.

However, this viewpoint also faces criticisms. Detractors argue that in regions with limited ISP choices, consumers lack the leverage to effect change through market dynamics. Moreover, without regulations, nothing prevents monopolistic ISPs from adopting predatory practices.

Personally, while the sanctity of net neutrality is undeniable, the solution might lie more in fostering ISP competition than in stringent regulations. A diverse and competitive ISP landscape would not only ensure better services but also organically uphold net neutrality principles. Relying on shifting governmental regulations, especially ones that change with political climates, might lead to an unpredictable and unstable digital ecosystem.

I trust this memorandum offers comprehensive insights into the matters at hand. Below are articles that you may find informative. Kindly reach out for further clarifications or discussions.

References:

- Fung, B. (2023, September 26). FCC to reintroduce rules protecting net neutrality. CNN. <https://www.cnn.com/2023/09/26/tech/fcc-net-neutrality-internet-providers/index.html>
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